

## EMPLOYER STATUS DETERMINATION

### 4 Rails Incorporated.

This is a determination as to the employer status of 4 Rails, Inc. (4 Rails) under the Railroad Retirement Act (RRA) (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §351 et seq.). 4 Rails has not previously been held to be an employer under the Acts.

The evidence is that 4 Rails was incorporated March 19, 1992, as a privately held corporation. On April 21, 1992, 4 Rails incorporated the McCloud Railway Company (McCloud Railway) as a wholly owned subsidiary. In May 1992, the Interstate Commerce Commission exempted from regulation a transaction whereby 4 Rails acquired from the McCloud River Railroad approximately 97 miles of right of way in Siskiyou and Shasta Counties, California. See: McCloud Railway Company--Acquisition and Operation Exemption--McCloud River Railroad Company, Finance Docket No. 32069, 57 Fed. Reg. 23599, (June 4, 1992). 4 Rails in turn leased the property to its subsidiary, which conducts rail carrier service over the line. Eighty percent of 4 Rails' gross revenue derives from its subsidiary rail carrier; the balance from non-railroad sources. 4 Rails has never had any employees.

Section 1 of the RRA defines "employer" to include:

(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. (45 U.S.C. §231(a)(1)(i) and (ii)).

Section 1 of the RUIA (45 U.S.C. § 351) and section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231) contain essentially the same definition.

A recent decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the RRTA held that a parent corporation which owns a rail carrier

subsidiary is not under common control with the subsidiary within the meaning of §3231. Union Pacific Corporation v. United States, \_\_\_ F. 3d \_\_\_, 1993 U.S APP. LEXIS 24010 (Fed. Cir., September 17, 1993).

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#### **4 Rails Incorporated.**

The facts in the Union Pacific case are indistinguishable from those presented by 4 Rails. Accordingly, a majority of the Board finds that 4 Rails, Incorporated is not and has never been an employer covered by the RRA and the RUIA because it is not under common control with its rail carrier subsidiary.

An appropriate Form G-215 is attached.

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Glen L. Bower

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V. M. Speakman, Jr. (Dissenting  
opinion attached)

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Jerome F. Kever

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**TO:** The Board

**FROM:** General Counsel

**SUBJECT:** 4 Rails, Inc.  
Employer Status

Attached is a draft determination finding that 4 Rails, Inc. is not a covered employer.

Because 4 Rails, as parent of its rail carrier subsidiary, is in the same position as the Union Pacific Corporation with respect to the Union Pacific Railroad, in our judgement the recent decision Union Pacific Corporation v. United States under the Railroad Retirement Tax Act requires a determination that 4 Rails is not under common control with its rail carrier subsidiary, and hence is not a covered employer.

Catherine C. Cook

Attachment

SABartholow:TWSadler:KTBlank  
4RAIL656.COV